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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 848

MARY W. STEWART, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Ninth Circuit
and
BRIEF IN SUPPORT OF PETITION

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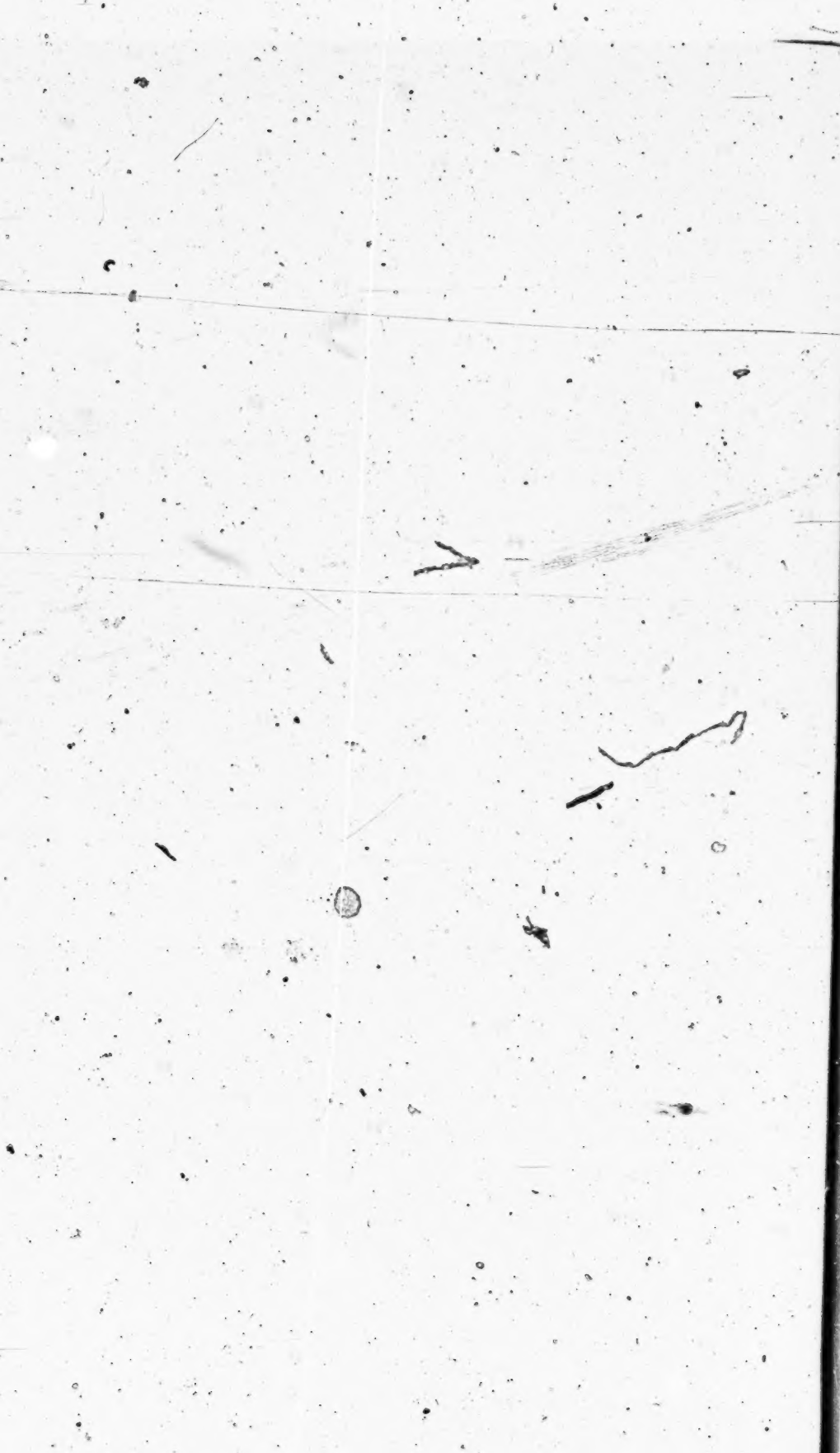

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MARY W. STEWART, ET AL.,
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vs.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Mary W. Stewart, Sears Point Toll-Road Co., American Trust Company, Bay Land Company, Field and Tule Land Company, West End Land Company and James Irvine, respectfully pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit (R. V—169) entered June 30, 1941 in a case numbered and entitled on its docket No. 9507, *United States of America, Appellant, v. Mary W. Stewart; et al., Appellees,*

reversing a judgment of the United States District Court for the Northern District of California, Southern Division, in favor of your petitioners. Petition for rehearing was denied October 16, 1941. (R. V—170)

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit by the United States to cancel three federal land patents and to quiet title. The lands claimed by the government had been in the undisturbed and undisputed possession of their private owners for forty years prior to the bringing of this suit. The patents which the government now seeks to cancel were, when suit began, 34, 20 and almost 6 years old, respectively. The property covered by them was originally waste marsh land. It has been reclaimed and improved by the private owners at a cost to petitioners themselves, exclusive of the cost of acquisition and of reclamation and improvements by their predecessors, in excess of $300,000. The government does not propose to reimburse the private owners for all or any part of their expenditures.

In 1841 Juan B. Alvarado, the then Mexican Governor of the Californias, granted to Victor Castro an island in the Bay of San Pablo, an arm of San Francisco Bay, named "La Yegua" or Mare Island. (R. V—39-40) Upon the page opposite we reproduce the government's Exhibit L-H1, showing Mare Island and, colored by us in red, the swamp lands here in controversy. The maps and other evidence all show that the only area ever known as or called Mare Island was the high land bearing that

Plaintiff's Exhibit L-11
U. S. Coast Survey
1863

3

N A P A B L O

name, as shown on the Exhibit. Petitioners contend that only the high land was granted to Castro. It is conceded that if the large expanse of swamp land to the northwest, which was never known as Mare Island, was not included in the grant, it passed to the State of California under the Swamp Land Act.

There is evidence in the record that all of the swamp land to the northwest of the island was, in its natural state, slightly above mean or ordinary high-water mark. Basing its claim upon that evidence, the United States asserts that all of these swamp lands were confirmed by the Board of Land Commissioners as a part of Mare Island. The government, as purchaser of the Castro grant, claims that the grant included all of these lands and therefore they did not pass under the Swamp Land Act.

In the 1880's this identical claim was made and litigated in an action of ejectment brought by the private owners against the Commandant of the Mare Island Navy Yard. The decision was against the government. The Commandant, represented by the United States Attorney and a special assistant employed by the government (Defts.' Ex. 20, R. I—177, II—667, III—203), set up the government's claim of title as a defense to the action (R. III—305-308). Mr. Justice Field, sitting in circuit with Judge Sawyer, held that these swamp lands were not a part of Mare Island, were not embraced within the Castro grant and had passed to the State of California under the Swamp Land Act. *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708. The case was carried to this Court upon a writ of error sued out at the direction of the Acting Attorney

General of the United States (Defts.' Ex. 21, R. I—177, II—669, III—204), and this Court affirmed the judgment below upon the authority of *Wright v. Roseberry* (1887) 121 U. S. 488. See *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578.

This result was accepted by everyone as final. While the State ceded jurisdiction over Mare Island to the United States, it retained jurisdiction of the swamp lands here involved. (Cal. Stats. 1854, Chap. XLIII, p. 48) The Commandant of the Navy Yard cooperated in making a survey of the boundary line of the lands which had been adjudged to belong to the private owners. (R. II—690-693) The lands were then leveed, reclaimed, improved and made valuable by petitioners and their predecessors at a cost to petitioners alone, as we have said, in excess of $300,000. (R. II—524-526; 676-688; 717-718; Defts.' Ex. 45, R. II—710, III—285-286) A portion of the area was patented by the United States to the State of California in 1896, 34 years before this suit was brought (Defts.' Ex. 6, R. II—651, III—189), another and larger portion was patented in 1910, 20 years prior to this suit (Defts.' Ex. 7, R. II—652, III—192) and the remainder in 1924, a few days within the period of the federal six-year statute of limitations (Defts.' Ex. 8, R. II—652, III—196). Petitioners, who are the present owners, all made their purchases and improvements after patents had issued, relying upon the *Irwin* decision, the consistent recognition of the State's title by federal as well as state officials, and upon the government's patents.

In 1930, without any explanation or showing of equity, the United States sought to disavow all that had gone on

before and to wrest from the private owners the lands that they had made valuable at so great a cost. To that end this suit was brought by the United States to cancel its outstanding patents and to quiet title. In plain disregard of every principle of equity and fair dealing the government has sought to repudiate its own patents, disavow the results of the *Irwin* litigation, ignore the applicable statute of limitations and set itself above the principles that govern the granting of equitable relief.

This the trial court held the United States might not do. After a protracted trial in which all of the issues were exhaustively examined, it was held—following exactly in that respect the *Irwin* decision—that the lands in controversy were not a part of Mare Island, were not embraced within the Castro grant (R. I—261); and had passed to the State under the Swamp Land Act (R. I—259). The trial court further held that as to the patents which were issued 34 and 20 years before the suit was brought the action was barred by the federal six-year statute of limitations, U. S. C., Title 43, §1166 (R. I—278), the case being ruled by the decision of this Court in *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447 (R. I—169). The Court further indicated, without deciding (R. I—169-176), that the position of the government was so grossly inequitable that, upon ordinary principles of equity, the court would not grant relief.

The Circuit Court of Appeals for the Ninth Circuit, one judge dissenting, reversed. Rejecting the holding of the trial court and the decision in the *Irwin* case alike, two of the judges held that, by virtue of the confirmation decree the lands should be taken to be within the Castro grant

and therefore did not pass to the State under the Swamp Land Act. (R. V—154-158) The majority further held, in plain disregard of the *Chandler-Dunbar* decision, that the federal six-year statute of limitations was not applicable (R. V—161-162), though the case is obviously within the exact language of the statute:

> "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." (U. S. C., Title 43, §1166)

And finally, though the court was sitting as a court of equity and though the result was admittedly inequitable —indeed, was so grossly inequitable that the concurring opinion suggested Congressional remedial action (R. V—166)—the court concluded that it was powerless to stay its own hand from doing inequity (R. V—163-167). The holding of the majority is that the United States, unlike any other litigant, is free to come into a court of equity and demand, in a suit brought by it against its own citizens, that the court shall exercise its extraordinary equitable powers for the purpose of granting relief which is grossly inequitable and unjust.

As indicated, one of the judges dissented. He held—in accordance with the *Irwin* decision—that the land was not a part of Mare Island and therefore passed to the State under the Swamp Land Act. (R. V—167-168)

It is petitioners' position that not only is the decision of the majority of the Circuit Court of Appeals wrong on the merits, but that its holding that the United States may come into a court of equity and demand relief that is

inequitable is so contrary to the accepted and usual course of proceedings in equity as to call for the exercise by this Court of its power of supervision.

To avoid a possible misapprehension, it should, perhaps, be added that while this case and *United States v. O'Donnell* (1938) 303 U. S. 501, are sometimes referred to as companion cases—because they both involve questions relating to the extent of Mare Island—the fact is that they involve different lands and the issues decided in the *O'Donnell* case are entirely different from those presented here. The title to the lands involved in the *O'Donnell* case was not adjudicated in the *Irwin* case. In the *O'Donnell* case, unlike this case, the private claimants had never been in possession of the land, nor had they bought after or in reliance upon the government's patents. In the *O'Donnell* case the trial court found that the lands there involved were a part of Mare Island, whereas the finding here is just the other way. Moreover, in this case, unlike the *O'Donnell* case, there was no concurrence by the courts below upon the finding. In the *O'Donnell* case the action was brought within the period of the statute of limitations, while in this case one of the patents was 34 years old and another was 20 years old when suit was brought. In that case the equities were all with the government—here it is admitted in the concurring opinion that the result of the majority's decision is so "grossly inequitable" as to warrant Congressional remedial action. The questions presented in this case are equally as important as, if not more important than the questions presented in the *O'Donnell* case and should be settled finally by a decision of this Court.

OPINIONS BELOW

The opinion of the District Court is reported in 29 F. Supp. 59 and appears in the record (R. I—165-176), and the opinions of the Circuit Court of Appeals for the Ninth Circuit are reported in 121 F. (2d) 705 and appear in the record (R. V—148-169).

STATEMENT OF BASIS OF JURISDICTION

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, U. S. C., Title 28, §347(a).

2. The decree of the Circuit Court of Appeals for the Ninth Circuit sought to be reviewed was entered June 30, 1941. (R. V—169-170) Petition for rehearing was filed July 28, 1941 and was denied October 16, 1941. (R. V—170)

QUESTIONS PRESENTED

Whether the United States Circuit Court of Appeals for the Ninth Circuit erred

(1) In holding that it was free to ignore the adjudication of the identical title involved in this case in *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708, affirmed by this Court in *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578.

(2) In holding that the federal six-year statute of limitations (U. S. C., Title 43, §1166) does not apply to the swamp land patents which were issued in this case 34 and 20 years, respectively, before suit was brought.

(3) In holding that, when the United States comes into a court of equity as a litigant seeking equitable relief against its patents, it is entitled to a preferred position over private litigants and is not subject to the ordinary principle that a court of equity will not do inequity.

(4) In holding that the United States may not be estopped, however unjust and inequitable its claim may be.

(5) In holding, contrary to the finding of the trial court supported by compelling evidence, that the lands in suit were a part of Mare Island and were embraced within the confirmed Castro grant.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1. The decision below is in conflict with the applicable decisions of this Court.

(a) This Court has adjudicated the identical title here involved, the effect of its decision being that title to the lands had vested in the grantees of the State of California under the Swamp Land Act. The issues, both of fact and of law, were thoroughly considered and determined in *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708. That decision was affirmed on a question of law by this Court in *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578. In this case the Circuit Court of Appeals, with one judge dissenting, has rejected the result of the prior adjudication. It is a matter of the gravest concern if those dealing with land titles emanating from the federal government cannot safely rely upon an adjudication

of the identical title in a litigation carried to this Court. The question is of far-reaching importance.

(b) This Court held in *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447, that the federal six-year statute of limitations (now U. S. C., Title 43, §1166) applies to actions by the United States to set aside its land patents in cases precisely parallel to this one. The court below has refused to follow the *Chandler-Dunbar* decision and has erroneously ruled that the statute does not apply. An important question of federal land law is involved, which should be settled finally by this Court.

2. The decision of the majority below is in conflict with decisions of other circuit courts of appeal on the same matter and so far departs from the accepted and usual course of judicial proceedings in equity as to call for an exercise of this Court's power of supervision.

(a) A majority of the Circuit Court of Appeals have held, contrary to the repeated course of decisions in other circuits, that the United States is entitled to relief in equity, in a suit brought by it to cancel land patents, which would be denied any other suitor because of the inequity of its claim: *Iowa v. Carr* (C. C. A. 8th Circ., 1911) 191 Fed. 257, 266, *United States v. D. & R. G. W. R. Co.* (C. C. A. 8th Circ., 1926) 16 F. (2d) 374, 376, *United States v. Chandler-Dunbar Water Power Co.* (C. C. A. 6th Circ., 1907) 152 Fed. 25, 41, *United States v. National City Bank* (C. C. A. 2d Circ., 1936) 83 F. (2d) 236, and to the earlier decision of the Circuit Court of Appeals for the Ninth Circuit in *Mountain Copper Co. v. United States* (C. C. A. 9th Circ., 1906) 142 Fed. 625, and to the

decisions of this Court, *Brent v. Bank of Washington* (1836) 10 Peters (35 U. S.) 596, *United States v. Detroit Timber & Lumber Co.* (1906) 200 U. S. 321.

(b) The majority of the Circuit Court of Appeals have come to the conclusion that the United States is entitled to equitable relief, though one of the majority states that the result is so grossly inequitable that it calls for Congressional remedial action. (R. V—166) The conclusion that a court of equity will grant affirmative relief, though the relief thus granted is patently unjust, so far departs from the accepted and usual course of judicial proceedings in equity as indicated by the cases last cited as to call for the exercise by this Court of its power of supervision.

3. The majority holding has resulted in a hopeless and irreconcilable conflict of decision in the lower courts upon the question as to the proper construction of the confirmation decree. The evidence overwhelmingly sustains the trial court's finding that the lands involved in this case were not in fact a part of Mare Island and were not granted to Castro. Mr. Justice Field and Judge Sawyer have so decided in the *Irwin* case, as has Judge Mathews in this case. Even the majority have not held otherwise. They have held, however, contrary to the finding below and the holdings of all of the other judges, that the confirmation decree must be construed as embracing all of these lands. This Court should exercise its power of supervision to bring about a uniformity of decision upon the important issues involved.

Wherefore, petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court,

directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case numbered and entitled on its docket No. 9507, *United States of America, Appellant, v. Mary W. Stewart, et al., Appellees,* and that the decree of said Circuit Court of Appeals be reversed, and that your petitioners have such other and further relief in the premises as to this Court may seem proper.

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THOMAS E. PALMER,
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Dated: San Francisco, California.
January 3, 1942.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. _____

MARY W. STEWART, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

A reference to the official reports of the opinions delivered in the courts below is set forth in the petition (p. 9) and, for brevity, that reference is adopted here.

II.

STATEMENT OF JURISDICTION

A concise statement of the grounds on which the jurisdiction of this Court is invoked is given in the petition (p. 9) and, by this reference thereto, is hereby adopted.

III.

CONCISE STATEMENT OF THE CASE

A summary statement of the matter involved is given in the petition (pp. 2-8) and, to avoid duplication, that statement is incorporated herein as a concise statement of the case.

IV.

SPECIFICATION OF ERRORS

The errors intended to be urged are those specified in the petition as the questions presented and numbered 1 to 5, inclusive (pp. 9-10), all of which are specifically assigned as error.

V.

SUMMARY OF ARGUMENT

The argument of petitioners can be summarized as follows:

1. The title to the identical lands here involved was previously adjudicated in an action against an officer of the federal government, who defended upon the basis of

the same claim of title in the United States as that made here. It was there held that the United States had no title and that the lands had passed to the State under the Swamp Land Act. *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708, affirmed in *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578. That adjudication stood unchallenged for a period of 40 years prior to the bringing of this suit, during which time it was respected and relied upon by everyone having anything to do with the matter. Upon the strength of that decision the lands were patented to the State and thereafter hundreds of thousands of dollars were invested by petitioners in purchasing and improving the land, all with the knowledge of the government. Upon the plainest principles of justice, and pursuant to the settled rule of *stare decisis*, the Circuit Court of Appeals was duty-bound to follow the earlier decision, as the trial court did, and erred in refusing to do so.

2. Swamp-land patent No. 72, which the government asks be cancelled, was issued in 1896 or 34 years before this suit was brought and swamp-land patent No. 152, which the government also seeks to cancel; was issued in 1910 or 20 years before this suit was brought. As to these patents the suit is plainly barred by the federal six year statute of limitations. Act of Congress March 3, 1891, §8. (26 Stats. 1095, 1099, U. S. C., Title 43, §1166) *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447.

3. In this case the United States has come into a court of equity, seeking affirmative equitable relief against its own land patents. The circumstances of the case are such

that granting the relief thus sought would be unjust and inequitable in the extreme. Indeed, one of the majority below, though concurring in the reversal of the trial court, was so impressed with what he said was the "grossly inequitable" result that he suggested there should be Congressional relief. Petitioners contend that the United States, like any other litigant, is subject to the governing principles of equity and cannot have affirmative relief in equity which is grossly inequitable.

4. The circumstances of this case are such as clearly give rise to an equitable estoppel. The holding of the court below that the sovereign may not be estopped is contrary to the repeated decisions of the federal courts.

5. The trial court, in passing upon the merits of the case, found that the lands here involved were not a part of Mare Island, were not granted to Castro and were not embraced within the confirmation decree and hence did not belong to the United States. This holding—which accorded exactly with the decision of Mr. Justice Field and Judge Sawyer in the *Irwin* case and with the views of Judge Mathews in this case—is supported by the great weight of the evidence. The majority below, without ruling that the lands were in fact a part of Mare Island or were in fact granted to Castro, have set aside the trial court's finding upon the ground that the lands were embraced within the confirmation decree. In so doing they not only disregarded the mandate of Rule 52(a) of the Rules of Civil Procedure that "findings of fact shall not be set aside unless clearly erroneous" but by their adverse decision on the merits have created an irreconcilable conflict in the decision of this point by the lower courts. This

Court should exercise its powers of supervision to bring about a uniformity of decision upon this critical issue.

ARGUMENT

I.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISION IN THE *IRWIN* CASE, IN WHICH THE TITLE TO THE IDENTICAL LANDS WAS ADJUDICATED. THE COURT BELOW ERRED IN REFUSING TO FOLLOW THE EARLIER DECISION.

We are here concerned with land titles emanating from the federal government, upon which patents have issued. This Court has on more than one occasion remarked upon "the immense importance and necessity of stability of titles dependent upon these official instruments".* The importance is, of course, greatly enhanced when it appears, as it does here, that, prior to the issuance of the patents, the identical title was adjudicated, especially when the case was carried to the highest court in the land. Such adjudication, long acquiesced in as it was in this instance, becomes a rule of property—a rule of the particular title—from which the lower courts are not free to depart.† The refusal of the court below to be guided by this principle

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**United States v. Maxwell Land-Grant Co.* (1887) 121 U. S. 325, 381; *United States v. Stinson* (1905) 197 U. S. 200, 204.

†To avoid any misunderstanding of our position, it should be said that we recognize that the *Irwin* decision, although rendered in a litigation against an officer of the government, is not *res judicata* as to the United States in view of such decisions as *Carr v. United States* (1879) 98 U. S. 433, and *United States v. Lee* (1882) 106 U. S. 196. Those cases, however, do not involve the principle upon which we rely

gives rise to a question of the utmost importance, affecting, as it does, many land titles.

From early days this Court has recognized and frequently applied the general principle of *stare decisis* in cases involving land titles. In a comparatively recent case this Court held that the rule must be applied, even against the United States and even though the United States was suing on behalf of Indian wards of the government. In *United States v. Title Insurance & Trust Co.* (1924) 265 U. S. 472, the United States, as guardian for certain Mission Indians, sought to quiet title to a perpetual right of the Indians to occupy, use and enjoy lands which were part of a Mexican land grant that had theretofore been confirmed and patented to others by the United States. The Indians had not presented their claim to the Board of Land Commissioners for confirmation. Some twenty-three years earlier the Supreme Court had decided that, in the absence of presentation of a claim for confirmation to the Board of Land Commissioners, the Indians had no right of possession, use or occupancy.* In the subsequent case it was contended, just as the United States contends here and as in effect the majority of the Circuit Court of Appeals have held, that the earlier decision was wrong and should be departed from. In rejecting this contention and in holding and emphasizing the importance of adhering to the earlier decision this Court said:

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here—which is that after an adjudication of the identical title has been allowed to stand for many years, so that those dealing with the title have purchased and made their improvements in reliance upon the adjudication, the courts will, in later litigation, adhere to the earlier decision.

*Barker v. Harvey (1901) 181 U. S. 481.

"The question whether that decision shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago, and affected many tracts of land in California, particularly in the southern part of the state. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on the decision. The defendants in this case purchased fifteen years after it was made. It has become a rule of property, and to disturb it now would be fraught with many injurious results. Besides, the government and the scattered Mission Indians have adjusted their situation to it in several instances. As long ago as Minnesota Min. Co. v. National Min. Co., 3 Wall. 332, 18 L.ed. 42, this court said (p. 334): 'Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective, and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.'"

This rule has particular, and we might add peculiar, application where, in the subsequent litigation, the identical title is again involved. As many courts of last resort have held, it would be intolerable if the same title, after

having been adjudicated by a highest court and the adjudication's having stood for many years, were to be open to re-ajudication. As this Court pertinently observed in the quotation given above,

> "'Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open'." (265 U. S. 486)

To illustrate this principle as applied to cases involving the identical title, it suffices to refer to a few cases which, in their essential aspects, approach the facts of the case at bar. In *Ingoldsby v. Juan* (1859) 12 Cal. 564, the California Supreme Court adjudicated the title to certain lands, the title to which turned upon the validity of a deed made by Donna Martina Castro to her children. Some years later, in the case of *Hihn v. Courtis* (1866) 31 Cal. 398, an attempt was made to relitigate the validity of this same deed as it affected the title to the same land, just as here the United States seeks to re-adjudicate the scope and effect of the confirmation decree. There, as here, the contention was that the previous decision was wrong and should not be followed. The court, in an opinion* which we commend to this Court, held that although the principle of *res judicata* did not apply, the matter was no longer open to reconsideration, saying (p. 402):

> "That decision has become a rule of property with reference to this land, and many parties may have

*It is interesting to note that the opinion was written by Associate Justice Lorenzo Sawyer who later, as United States Circuit Judge, participated with Mr. Justice Field in the decision of the *Irwin* case. Moreover, the decision was concurred in by Associate Justice Rhodes, who was appointed special counsel for the government in the *Irwin* case.

purchased portions of it during the last eight years on the faith of the adjudication. Certain it is, from the number of parties to this and the other suit referred to, decided at this term, that many persons are interested in the lands in controversy. To overturn the former adjudication under such circumstances, because a majority of the present court might arrive at a different conclusion from that attained by their predecessors—men equally well qualified to discern, and equally conscientious in the pursuit of the right, would be to trifle with the rights of litigants and bring merited obloquy upon the administration of justice.

* * *

"There was an adjudication on the identical deed—the identical title—eight years ago, and important rights may, and probably have, been acquired on the faith of that adjudication. If after a lapse of so long a term this adjudication could now be properly disturbed, in the language of Mr. Fearne, before cited, 'Even a decision of a court of justice upon the very identical title would be nothing more than a precarious temporary security.' It could, in fact, hardly be called a 'temporary security.' For these reasons we decline to re-examine the grounds of the decision in *Ingoldsby v. Juan*, and without intimating any opinion as to the correctness or incorrectness of the conclusions attained, adhere to it in this case on the principles of *stare decisis*."

A very illuminating application of the rule is afforded by two decisions of the Supreme Court of Michigan. In *Winans v. Willetts* (1917) 197 Mich. 512, the rights of the parties turned upon the question whether Winans Lake was in point of fact navigable or non-navigable,

just as this case turns upon whether the lands were a part of Mare Island and within the confirmed Castro grant. The Supreme Court of Michigan held that the lake was non-navigable. Some nine years later the identical question arose in *Pleasant Lake Hills Corporation v. Eppinger* (1926) 235 Mich. 174. It there appeared that the corporation, relying upon the former adjudication, had acquired the Winans lands and had expended some $170,000 in improvements. The defendants sought to relitigate the question of title to the lake. Mr. Justice Fellows, who dissented in the earlier case, wrote the opinion of the court and squarely ruled that the title could not be re-adjudicated. He said:

> "The writer of this opinion did not then agree with the opinion of the court in that case and wrote in dissent. But it is unimportant what his views then were or now are. We think it is likewise unimportant what views any or all the members of the court as now constituted entertain. Every reason for the application of the doctrine of stare decisis demands that this court accept the holding of the court in that case as final. The property involved is the same. The rights asserted are the same. In reliance upon the decision in that case, plaintiff has invested $170,000. Every element of fair dealing with litigants requires us to recognize the doctrine of stare decisis, and as applied to the same property follow the decision in that case. If it is to be ever overruled, it should be in a case involving other property than that specifically passed upon there."

The same principle was applied by the Supreme Court of Michigan in *St. Helen Shooting Club v. Carter* (1929)

248 Mich. 376, where the Court followed its earlier decision in *St. Helen Shooting Club v. Mogle* (1926) 234 Mich. 60.

The Supreme Court of Tennessee has very forcefully announced the same principle. In *Burr v. White Oak Lumber Co.* (1924) 149 Tenn. 191, the question of title turned in part upon the validity of a tax deed, which the trial court held to be valid. It appeared, however, that some 27 years previously the Supreme Court of Tennessee, in the case of *Darrow v. Wright,* held the identical tax deed to be void, just as in the *Irwin* case it was decided that the confirmation decree did not cover the lands here in suit. The Supreme Court of Tennessee held the failure to follow the earlier decision was error, saying:

> "We are of the opinion, however, that the validity of this tax sale is not an open question in Tennessee.
>
> * * *
>
> "A title previously passed upon, although in a suit between different parties, ought not to be again controverted and examined in a case presenting the same question upon the same facts.
>
> * * *
>
> "So we think that the decision in Darrow v. Wright established a rule of property as to the land covered by the tax deed from B. Lee to Freddie Matson. This decision became the law of the Matson title, and we are not willing to disturb it after 27 years.
>
> "Although there was no written opinion in Darrow v. Wright, the decree was none the less effective to declare the law of that title. It was necessarily relied on by everyone who examined the title to any portion of this land and purchased any portion thereof."

In the case of *Fisher v. Lott* (1908) 33 Ky. L. 609, the question of title turned upon the provisions of a will. Some 43 years previously the same will had been before the court. It was contended that the former adjudication was wrong and should not be followed. The Court of Appeals of Kentucky held, however, that the question was not open to re-examination, saying:

> "Whatever doubt we may have had concerning the construction placed upon this clause of the will is resolved in favor of that consistency which ought to prevail in the opinions of the court concerning identical matters, particularly where the title to real estate is involved, and upon the faith of which previous opinion the public may have been led into a sense of security in trafficking in these titles, relying upon the presumption that, when once authoritatively construed by the court of last resort of the state, that construction is conclusive."

We forbear further citation. The rule, as well as the reason for it, must be plain. Both are in exact harmony with the underlying principles upon which this Court grants certiorari to prevent and resolve those conflicts of decision which are so inimical to the orderly administration of justice.

Upon the record, the case here is much stronger in calling for uniformity of decision than the usual one. Not only has the identical title been adjudicated against the identical claims now made by the government, but upon the strength of that adjudication the government issued its patents. Following the issuance of those patents and in reliance upon them the present owners bought their lands

at a cost of many thousands of dollars, improved them and made them valuable. Of the six judges in the courts below who have passed upon the question, four have held that the lands do not belong to the United States. The remaining two would repudiate all that has been decided before, in flagrant disregard of the principle that protects those who, in dealing with land titles, rely upon a final decision of a court of last resort.

It is stated in the principal majority opinion that the rights of those claiming under the State have from the beginning been shrouded in doubt and uncertainty and, absent an adjudication of title to which the government was a party, those claiming under the State were not entitled to rely upon the government's patents. As to the matter of doubt and uncertainty, while doubt may have existed prior to the *Irwin* decision, from the time of that decision in 1890 down to the filing of this suit there was no doubt or uncertainty whatever. The record shows beyond any possibility of dispute that private parties and government officials alike regarded that decision as final. The record is barren of any dissent from or question of it.

As to the suggestion that, absent an adjudication of title to which the government was a party, petitioners were not entitled to rely upon their patents,—surely it cannot be the law that after this Court has passed upon and adjudicated a particular land title, those dealing with that identical title ought to regard the matters thus adjudicated as being still unsettled. Nor should it be the rule, as the opinion below implies, that official patents of the United States are nothing more than, to use the phrase of Mr.

Fearne, "precarious temporary security," conveying only a speculative title. On the contrary, where, as in this case, patents have issued after a decision of this Court that title has passed from the government, those patents should be deemed conclusive.

It is respectfully urged that this Court should, by an authoritative decision, settle this important principle of land law.

II.

THE ACTION IS CLEARLY BARRED BY THE FEDERAL STATUTE OF LIMITATIONS AS TO THE PATENTS WHICH WERE 34 AND 20 YEARS OLD WHEN SUIT WAS BROUGHT.

After the decision of this Court in the *Irwin* case the government issued patents to the State of California covering all of the lands involved in this suit. Swamp-land patent 72 was issued in 1896, 34 years before this action was brought, and swamp-land patent 152 was issued in 1910, 20 years before. As to those two patents the action is plainly barred by the federal six-year statute of limitations, Act of Congress March 3, 1891, §8 (26 Stats. 1095, 1099, U. S. C., Title 43, §1166), which provides:

> "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents."

The case is, of course, within the exact language of this statute. The government has claimed, however, and a majority of the court below have held, that the statute

does not apply where the Land Department did not have jurisdiction to issue the patent and, so it is said, there was no jurisdiction here because the lands were within the confirmed Castro grant. Aside from the fact that that question has, as we have seen, been concluded by the *Irwin* litigation and, as we shall later see, the evidence conclusively shows that these lands were not within the confirmation decree, this Court has held that a claim of want of jurisdiction in the Land Department affords no defense to the statute. This point was directly ruled upon in the leading case of *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447, a unanimous decision written by Mr. Justice Holmes.

In the *Chandler-Dunbar* case the patent under attack purported to be issued upon a scrip location. After the patent had issued the government claimed, just as it does here, that the patent was absolutely void because the Land Department had no jurisdiction, the lands having been reserved at the time of patent. It is obvious that if the land was in fact reserved at the time of patent it was just as much beyond the jurisdiction of the Land Department as would be the case of land embraced within a confirmed Mexican grant. The Supreme Court declined to pass upon the question whether the land was in fact reserved, holding that, assuming it was, none the less the patent was protected by the statute and should be held to be good. The ruling upon this point is contained in two short paragraphs and is so important that we quote:

> "There is force in the contention of the United States that the land was reserved and that it had not

been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion that now the patent must be assumed to be good. The statute just referred to provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act.'—that is to say, from March 3, 1891. This land, whether reserved or not, was public land of the United States, and in kind open to sale and conveyance through the Land Department. United States v. Winona & St. P. R. Co., 165 U. S. 463, 476, 41 L. ed. 789, 795, 17 Sup. Ct. Rep. 368. *The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect.* It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued', it describes the purport, and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261.

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land at least, which cannot escape from the jurisdiction, generally are held to affect the right even if in terms only directed against the remedy. Leffingwell v. Warren, 2 Black, 599, 605, 17 L. ed. 261, 263; Sharon v. Tucker, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct.

Rep. 720; Davis v. Mills, 194 U. S. 451, 457, 48 L. ed. 1067, 1071, 24 Sup. Ct. Rep. 692. *This statute must be taken to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place.** See United States v. Winona & St. P. R. Co., 165 U. S. 463, 476, 41 L. ed. 789, 795, 17 Sup Ct. Rep. 368."

The majority below have sought to read an exception into the statute by holding that the statute is "strictly a part of the public land laws"† and hence applies only to patents under those laws. The patents under attack here were issued under the Swamp Land Act of 1850, which is one of the important acts of Congress disposing of large areas of the public lands. Assuming, however, that that Act is not one of the public land laws, the answer to the majority below is that this Court has itself held the statute to be applicable to a patent issued upon a confirmed Mexican land grant, which by no stretch of language could be said to be a patent issued under the public

*All emphasis throughout this brief is ours unless otherwise expressly noted.

†In support of this conclusion the majority have taken out of its context this phrase appearing in the opinion in *United States v. Minnesota* (1926) 270 U. S. 181, 196, and have misapplied it. In that case the United States was suing not, as here, in its own right, but in the interest of its Indian wards. The purport of the decision is that the statute, while it binds the interests of the United States, does not bind the interests of other persons. This is apparent from the cases cited in the opinion dealing with Indian lands, such as *Cramer v. United States* (1923) 261 U. S. 219, 233, and *LaRoque v. United States* (1915) 239 U. S. 62. The case in no respect modifies the doctrine of the *Chandler-Dunbar* decision that where the interests of the United States alone are involved the statute applies.

land laws. See *United States v. Coronado Beach Co.* (1921) 255 U. S. 472, 488. There are numerous similar decisions in the lower federal courts where certiorari has been denied. See *United States v. Hogan* (C. C. A. 9th Circ. 1934) 72 F.(2d) 799, cert. den. 295 U. S. 752, *Putnam v. Ickes* (C. A. D. C. 1935) 78 F.(2d) 223, 227-228, cert. den. 296 U. S. 612.

There is no warrant whatever for the attempt of the majority below to read an exception into the statute nor for their refusal to follow the controlling decision of this Court. Their decision is the more flagrant because it results in the very hardship which it was the purpose of the statute to avoid. Here the only interests involved, other than those of petitioners, are those of the United States itself. Therefore, as this Court so well said in the *Chandler-Dunbar* case, whether the Land Department had authority to issue the patent or not

> "the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect."

It is submitted that the majority below have decided this federal question in a way which is in conflict with the applicable decisions of this Court and that certiorari should be granted to the end that there may be uniformity upon this important question involving so many land titles.

III.

THE COURT BELOW ERRED IN HOLDING THAT THE UNITED STATES, WHEN IT COMES INTO A COURT OF EQUITY SEEKING AFFIRMATIVE EQUITABLE RELIEF, IS NOT SUBJECT TO THE ORDINARY PRINCIPLE THAT A COURT OF EQUITY WILL NOT DO INEQUITY.

The outstanding feature of the decision of the court below is the great injustice of the result that has been reached. This is not merely our characterization of the case—it is what the majority, who pronounced the judgment, have themselves recognized. The principal majority opinion asserts that the injustice is no defense, even to a plea for *equitable* relief, (R. V—165-166) and that any relief must be by legislative action (R. V—166). The circuit judge who concurred in that opinion did so, as he says, "despite the grossly inequitable result", adding that "it is peculiarly a case for Congressional remedial action, beyond the equitable powers of this court". (R. V—166) We have, therefore, a decree of a court of equity which is confessed by those who made it to be most inequitable and unjust. This decision that the United States may have affirmative relief in equity, notwithstanding the gross injustice and inequity thereof, is not only in conflict with numerous decisions in other circuits, but presents the question whether the court below has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is difficult to state adequately the inequity and injustice that results from the decree below. The facts show, however, that the case here is an extreme one.

It first appears that the lands with which we are concerned were surveyed, preparatory to sale, as early as 1869. This survey was known as Swamp Land Survey 569. (Defts'. Ex. 4, R. II—648, IV—37) The land was sold to and paid for by one of petitioners' predecessors and was patented to him by the State of California in 1874. (Defts'. Ex. 5, R. II—651, III—185) It was stipulated that ever since 1882 all of these lands were each year assessed and taxed by the State of California or by its political subdivisions. (R. II—645)

In the 1880's, when the government was faced with a claim of a chain of title out of Castro prior to its own, the government's attorneys repudiated the Castro grant and succeeded in proving that it was a forgery and void. The Circuit Court for the Northern District of California so held in *Bouldin v. Phelps* (1887) 30 Fed. 547. It is not surprising, therefore, that it was assumed that the government did not rely upon that grant. It hardly need be added that Bouldin, who was claiming under the Castro grant, was not one of the petitioners' predecessors in interest.

A controversy between petitioners' predecessors and officers of the government at the Navy Yard developed and on September 13, 1883 the *Irwin* suit was filed by petitioners' predecessors, alleging that they were the owners of the land in Survey 569 and that Irwin, who was the Commandant at the Navy Yard, was excluding them from possession. (R. III—287-290) Irwin set up in his answer the same claim of title in the United States as

that asserted in this action (R. III—305-310) and, as we know, Mr. Justice Field and Judge Sawyer decided that claim adversely to the government upon all points. *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708. Not satisfied with this result, the government's attorneys carried the case to this Court, where the judgment was affirmed. *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578.

With the matter seemingly finally adjudicated by the highest court in the land, actual reclamation and use of the land by the private owners proceeded, with full knowledge and acquiescence by the government and appropriate affirmative action upon its part. As early as 1885 a portion of the land had been sectionized and a township plat thereof officially approved. (Defts'. Ex. 41, R. II—711-712, IV—51). This township plat was followed in due course by a patent dated June 5, 1896 from the United States to the State of California covering that portion of Survey 569 shown upon the township plat. (Defts'. Ex. 6, R. II—651, III—189.)

The evidence shows that Dr. L. E. Cross bought the land toward the end of 1895 (R. II—720) and forthwith took steps to levee and reclaim it. (R. II—524-525). To make sure that there would be no controversy with the government, Dr. Cross wrote to the Commandant under date of December 5, 1896 as follows:

"Sir:

"I intend within the next thirty days to begin the reclamation of the tule land north of the Govern-

ment boundary line, and desiring no conflict with the Government or its representatives I would respectfully ask that I may, at my own expense, employ a Surveyor to locate said lines for me. I have asked Mr. Simonton of the Y & D Deptmt to do the work for me, which he refuses to do without your knowledge and consent,—he being employed by the Government would naturally look out for the Government's interest as well as mine." (R. II—690-691)

To this, the Commandant replied:

"In response to your letter of the 5th inst., you are informed that we have notified the Department of Yards and Docks to grant Mr. Simonton permission to make the survey desired by you. At the same time I have directed the Civil Engineer of the Yard to extend all necessary information and keep an eye on the work in order that the boundary line once established may be done so accurately that no objections will ever be raised by either of the parties interested therein." (R. II—692)

The work of leveeing the land, known as Island No. 1 (R. II—526, see also IV—35-36), took two years (R. II—686) and cost in excess of $80,000 (R. II—689). The work was done with a large clam shell dredger (R. II—687) and necessarily was done with the knowledge of the government. Moreover, when those on Island No. 1 wanted to go to town (Vallejo), they crossed Mare Island Straits on the ferry at the Navy Yard (R. II—536) and, with the permission of the authorities at the Yard, Cross built a road from Island No. 1 along the intervening "neck"

of marsh land over to Mare Island itself (R. II—528-529, 536-538), so that they could reach the ferry.

In 1904 another portion of Island No. 1 was sectionized and the township plat thereof approved (Defts'. Ex. 42, R. II—712, IV—52) and on February 7, 1910 those portions of Island No. 1 shown on that plat were patented to the state. (Defts'. Ex. 7, R. II—651-652, III—192) Township plats covering the rest of the land involved in this suit were approved in 1923 (Defts'. Exs. 43 and 44, R. II—712, IV—53 and 54) and the land was patented to the state on April 26, 1924 (Defts'. Ex. 8, R. II—652, III—196) This action upon the part of the government was taken advisedly. The record shows that the Land Department communicated with the Navy Department and ascertained that, as a result of the *Irwin* litigation, the Navy Department made no claim to these lands, and accordingly they were patented. (Defts'. Ex. 37, R. II—707, III—260-265)

This action by the Land Department was, of course, in line with that taken by the Navy Department on the ground. In 1914 that Department erected the present boundary fence between the lands involved in this suit and those claimed by the Navy (i. e., between the lands in Swamp Land Survey 569, which were litigated in the *Irwin* case, and those in Swamp Land Survey 34, which were involved in the *O'Donnell* case) and that fence has been maintained by the Navy ever since. (R. II—588) It was also in line with the action of the Navy Department in recording in the Recorder's Office of Solano County on November 10, 1913, in Book 5 of Maps at page 4, a

formal map of the Mare Island Navy Yard Reservation, in accordance with the Act of the California Legislature of March 2, 1897 (Cal. Stats. 1897, p. 51) ceding jurisdiction of lands occupied by the United States for military purposes or defense. The Court will note that this map (R. IV—38) shows that the reservation did not cover any of the lands involved in this suit, but stopped at the Navy Yard fence.

We have already seen that all of the present petitioners, without exception, purchased their lands after the decision in the *Irwin* case and also after the land had been included in the public land surveys and had been patented to the state. The lands were purchased at a cost to them in excess of $180,000 (R. II—679-685, 717, III—285) and, as we have said, they spent in excess of $300,000 in improving them.

The government contends that notwithstanding all this, it is now free to come into a court of equity, and, without offering to do equity or to make any restitution, repudiate all that has gone on before, including its own patents which were freely issued, and take from petitioners the lands which they and their predecessors have so long held and, at such great expense, have made valuable. It is difficult to imagine a case more wanting in equity. Manifestly, a private person could not prevail in a court of equity upon a claim so barren of any justice. At the behest of a private person equity would decline to exercise its extraordinary powers to bring about such a wanton result.

The important question which the decision below poses is—Is the United States entitled to a preferred status, so

that it may have relief in equity when its claim is wanting in every element of essential justice? Or, when the United States comes into a court of equity, is it subject to the guiding principles which govern the granting of equitable relief? Upon this point there should be but one answer.

The case here is not one, as the concurring opinion below would suggest, of mere laches on the part of the government. We have here far more than mere delay, as the facts recited above show. We have an over-all result that is essentially unjust, and the unusual spectacle of a court of equity declaring that it is without power to stay its own hand from doing this injustice. Such a declaration by the court is in conflict with the reported decisions of this Court and with those of many of the other circuits. The decisions are numerous and practically in accord on the proposition that when the United States comes into equity seeking relief it does so on the same footing as other litigants (except as to laches and limitations) and a court of equity will not decree, at the instance of the United States, that which is essentially inequitable and unjust.

In *Brent v. Bank of Washington* (1836) 10 Peters (35 U. S.) 596, this Court, in a suit in equity, declined to decree a transfer of stock in defendant bank held by the estate of a deceased paymaster to satisfy the government's statutory priority, where, under the bank's charter, the bank had the right to be paid the indebtedness due it before transfer of the stock, the holding being:

> "Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come

as other suitors, seeking in the administration of the law of equity, relief; to give which, courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This court, in The United States v. Mitchell, 9 Peters, 743, have recognized the principle in the common law that though the law gives the king a better or more convenient remedy, he has no better right in court than the subject through whom the property claimed comes to his hands. 2 Co. Inst. 573; 2 Ves. Sen. 296, 297; Hard. 60, 460. This principle is also carried into all the statutes, by which the appropriate courts are authorized to decide, and under which they do decide on the rights of a subject in a controversy with the king, according to equity and good conscience between subject and subject." (35 U. S. 614)

In *United States v. Detroit Timber & Lumber Co.* (1906) 200 U. S. 321, in denying the government relief where it sought to set aside land patents as against a bona fide purchaser, this Court said:

"It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of, and anterior to, all congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases. In passing upon transactions between the government and its vendees we must bear in mind the general principles of equity, and determine rights upon those principles, except as they are limited by special statutory provisions." (200 U. S. 339)

In *United States v. Norwegian Barque "Threkla"* (1924) 266 U. S. 328 this Court, sitting in admiralty but

applying the principles of equity, held that if the government comes into court seeking damages for a collision at sea it is liable, just as any private litigant would be, for damages equitably assessable against it, saying:

> "When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." (266 U. S. 339-340)

Surely it is not holding the government up to too high a standard to require that, in suits brought by it against its own citizens, it shall be held to have agreed "that justice may be done with regard to the subject matter".

The expressions of the Court which we have quoted are not mere occasional sporadic statements of an exception to the general rule, but indicate a consistent course of decision, enunciating what is the usual and accepted principle. They find their counterpart in numerous decisions of the lower federal courts. A few citations will suffice to illustrate.

In *United States v. National City Bank* (C. C. A. 2nd Cir. 1936) 83 Fed. (2d) 236, certiorari denied 299 U. S. 563, it was held that the United States, seeking in equity to recover a bank deposit as assignee of the Russian government, is subject, like any other litigant would be, to a claim of set-off, the court saying:

> "The United States suing, having no more rights than its assignor, is subject to that set-off. When a sovereign sues, it may not expect a preferred status, for its suit is determined according to the rules applicable to private suitors in like cases." (83 F. (2d) 239)

In *United States v. Devereux* (C. C. A. 4th Cir. 1898) 90 Fed. 182, it was held that after long delay the United States could not enforce a trust deed given to secure certain judgments, where the property had come into the hands of innocent purchasers, the court saying:

> "It was suggested in argument that as the United States in this case comes into court claiming rights as cestui que trust under a deed between private parties, and asserting these rights as a private individual would, the case does not involve any governmental right or duty; that, therefore, the ordinary rules controlling courts of equity as to laches should be enforced. This position cannot be maintained. The United States do not and cannot hold property as a monarch may for private or personal purposes. Van Brocklin v. Tennessee, 117 U. S., at page 158, 6 Sup. Ct. 670. In the present case the United States holds what title it has to the property in question as it holds all other property for public and private purposes (U. S. v. Insley, 130 U. S. 265, 9 Sup. Ct. 485); and cannot be prejudiced by the negligence of the officers and agents to whose care their interests were confined; nor are they bound by any statute of limitations (U. S. v. Railway Co., 118 U. S. 120, 6 Sup. Ct. 1006).
>
> "With this exception, however, and in perfect consistency with it, when a sovereign comes into one of its own courts of its own accord, and seeks relief, all the rules established for the administration of justice between individuals are applied and bind all parties." (90 Fed. 186)

In *Mountain Copper Co. v. United States* (C. C. A. 9th Cir. 1906) 142 Fed. 625 it was held that the United

States would be denied injunctive relief against fumes of a copper smelter which had destroyed timber and vegetation on public lands, where similar relief would be denied a private person, the court saying:

> "It is the well-established law that, when the government comes into a court asserting a property right it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less." (142 Fed. 629)

In *The Falcon* (D. C. Md. 1927) 19 Fed. (2d) 1009 the government was denied relief against a tug which was alleged to have been responsible for a collision because, during the four years' delay in bringing suit, the tug had passed into hands of innocent purchasers against whom it would have been inequitable to grant relief. It was there said:

> "There is, indeed, an element of estoppel against the United States involved in the facts of the case at bar, by reason of its failure to act for a period of two years after the injury was suffered, and its seeming acquiescence in the sale of the tug. Estoppels against the public are perhaps not as readily granted as against private individuals, but it has been decided frequently that the public may estop itself by acts done in its proprietary capacity. While mere delay, either by limitations or laches, does not of itself constitute a bar to suits of the United States, yet when a sovereignty submits itself to the jurisdiction of a court of equity, and prays its aid, its claims and rights are adjudicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances." (19 F. (2d) 1014)

In *United States v. Flint* (C. C. Cal. 1876) 25 Federal Cases 1107, #15,121, the government was denied relief upon equitable grounds, against a decree of confirmation alleged to have been obtained by fraud, the court saying:

> "The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but when they enter the courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals. * * * And, when they go into a court of equity, they must equally present a case by allegation and proof entitling them to equitable relief.
>
> * * *
>
> "All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the government be the suitor against him." (25 Fed. Cas. p. 1113)

In *United States v. Dominion Oil Co.* (D. C. Cal. 1917) 241 Fed. 425 the government was denied a temporary injunction and receiver as to oil lands within a presidential withdrawal upon the ground that a private litigant could not have such relief, the court saying:

> "I conceive it to be clearly established, both upon reason and authority, that the government, in such a case as this, and even under circumstances so persuasively in its favor, possess no higher or different rights than a private individual seeking similar relief would possess. The fact that the securing or conserving of oil as a fuel for its navy, whereby it may properly defend or even perpetuate itself, is involved, does not add to its rights in this court nor change its character as a suitor. What it may do because of

military necessity through its executive branch does not concern us here." (241 Fed. 427)

The court below has, we respectfully submit, erred in not giving effect to the rule of these cases. Its decision gives the government a status, as a party litigant in equity, to ask and receive relief that is grossly inequitable. That the government does not enjoy such a status and that it may not have relief that is against all conscience is attested by the cases cited.

Upon general principles of equity the court below should have denied the government the relief sought in this case.

IV.

THE COURT BELOW ERRED IN HOLDING THAT THE GOVERNMENT IS NOT SUBJECT TO A PLEA OF EQUITABLE ESTOPPEL.

The facts previously reviewed (pp. 20-24, *supra*) not only establish a case in which upon general principles of equity relief should be denied, but make out a plain case of equitable estoppel. As we read the opinion below (R. V—163-166), the essence of the holding is, not that the facts at bar are insufficient to establish a case of equitable estoppel if that defense be available, but rather that the sovereign is not subject to the defense. This holding is in direct conflict with decisions in other circuits upon the same matteer.

Undoubtedly the leading case in the federal courts upon the subject of equitable estoppel as against the sovereign

is *Iowa v. Carr* (C. C. A. 8th Cir. 1911) 191 Fed. 257. In that case the question was whether the sovereign, the State of Iowa, was estopped to claim certain lands which were uncovered by a sudden avulsion of the Mississippi River. Upon facts much less extreme than those presented here the court held that the sovereign was estopped.

> "Counsel for the appellants, however, invoke the general rule that neither by the statute of limitations, nor by laches, does mere delay bar the sovereignty from maintaining its rights or from sustaining a suit to enforce them. (Citing cases) They also contend that every sovereignty is exempted from the rule of equitable estoppel.
>
> "But the great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances.
>
> "The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances." (191 Fed. 265-266)

After reviewing the authorities the court concluded, even as the court below in this case should have concluded:

> "There is no equity in the claim of the state against the plaintiffs in this case, it does not appeal to the

conscience, it is met by an equitable estoppel, it was not presented or prosecuted with reasonable diligence, and a court of equity will not sustain it." (191 Fed. 270)

The same rule has been announced by the Circuit Court of Appeals for the Eighth Circuit in a case where the United States was held to be estopped to recover certain right-of-way lands in view of the inequity of its claim. In *United States v. D. & R. G. W. R. Co.* (C. C. A. 8th Cir. 1926) 16 F. (2d) 374 the court said:

"The equitable claims of a state or the United States are no stronger than those of an individual under like circumstances, and a state or the United States may waive a claim or be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim" (16 F. (2d) 376)

In *United States v. Chandler-Dunbar Water Power Co.* (C. C. A. 6th Cir. 1907) 152 Fed. 25* it was claimed, even as it is claimed here, that the patent under attack was issued in excess of jurisdiction of the Land Department and therefore should be cancelled. The Circuit Court of Appeals for the Sixth Circuit indicated, however, that relief should be denied upon grounds of equitable estoppel, saying:

"It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without

*Affirmed in *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447 upon the ground that the suit was barred by the federal statute of limitations.

regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another." (152 Fed. 41)

The authorities are so exhaustively analyzed and reviewed in *Iowa v. Carr* that we forbear further citation. That case has been cited by this Court with approval* and has repeatedly been followed. It would be a work of supererogation for us to cover the ground so thoroughly and painstakingly covered in the opinion in that case.

In the opinion below (R. V—165) a number of cases are cited as supporting the conclusion that the government may not be estopped. An examination of the opinions in those cases will disclose that in none of them would a private individual, upon the facts, have been estopped. With all deference, it is submitted that those cases do not stand for any general proposition that the government may not be estopped.

We respectfully urge that the court below erred in holding that the defense of equitable estoppel was, as a matter of law, not available against the government.

V.

UPON THE MERITS, THE CONFIRMATION DECREE DID NOT EMBRACE ANY OF THE LANDS IN SUIT AND THE COURT BELOW ERRED IN NOT SO HOLDING.

The decision of the majority below is not only inequitable and unjust,—it is wholly unnecessary. As the dissent-

*Pan American Petroleum etc. Co. v. United States (1927) 273 U. S. 456, 506.

ing opinion makes clear (R. V—167-169), the whole matter should be disposed of by construing the confirmation decree as it is written—and, we might add, as it was construed by the trial court and in the *Irwin* case—as embracing only the lands "called" Mare Island. Had the majority pursued this course instead of ignoring the mandate of Rule 52(a) of the Federal Rules of Civil Procedure that "findings of fact should not be set aside unless clearly erroneous", all of the problems that their decree now presents, and its injustice as well, would have been avoided.

We are not unmindful of the fact that ordinarily a question relating to the proper construction of a particular decree is not available upon certiorari. Here, however, the petition presents important questions of law, and some of those questions may prove to be troublesome. In such circumstances, where the whole cause can be disposed of by determining a question of the proper construction of a confirmation decree, it is open to this Court to pursue that course. And this is all the more so where, as here, the judgment below results in an irreconcilable conflict of decision upon this particular issue in a way that tends to bring the due administration of justice into disrepute. The case is one where this Court may appropriately exercise its powers of supervision to bring about that consistency of decision that should result from a proper functioning of the judicial process.

The trial court found that the lands in suit were never known as or referred to as or by the name of Mare Island, that they were not a part of Mare Island and were not

embraced within the Castro grant or within the decree of confirmation of the Board of Land Commissioners. (R. I—261) That being so, these lands passed to the State under the Swamp Land Act.

There is no evidence whatever that these lands were ever called or referred to as Mare Island. A great mass of evidence, particularly the government's official maps (see, as illustrative, IV—13, 15, 17, 19, 35 and 36), demonstrates the contrary. The majority below have not found and could not find that these lands were ever called or referred to as Mare Island. Instead, they have held that the lands were nevertheless embraced within the confirmation decree and were thus excluded from the Swamp Land Grant.

This question has now been passed upon by six judges, —the two judges in the *Irwin* case, the trial judge in this case and the three judges in the court below. Of these six judges, four of them, including Mr. Justice Field of this Court, have held the other way. And, we submit, rightly so.

The confirmation decree contains but a single sentence describing the land confirmed:

> "The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called 'Isla de la Yegua' or Mare Island and being an Island is bounded by the water's edge." (R. V—70)

The Court will note that the decree contains two calls —one for the place "called 'Isla de la Yegua' or Mare Island" and the other for "the water's edge". The majority, ignoring entirely the first call, have construed the

second as being a call for the common law line of ordinary high-water mark and have thus included all of the swamp land in Survey 569 to the northwest of Mare Island as being a part of the island. By this process they have erroneously multiplied the Castro grant more than five-fold.

That the majority have misconstrued the confirmation decree is plain. What Castro petitioned for was an island "in the Bay of San Francisco *called* 'Mare Island' ". (R. V—36) The grant to him recites his petition "for the ownership of the Island *named* 'La Yegu' " and grants him "said Island". (R. V—39) The petition for confirmation refers to "the Island *called* 'Isla de la Yegua' in the present County of Sonoma". The opinion of the Board of Land Commissioners shows at the outset that the proceedings were "for a place *called* Mare Island" and the only question that is considered in the Board's opinion is whether the grant to Castro was a forgery or not. (R. V—67-69) The Court will look in vain through the entire proceedings before the Board (R. V—1-72) for any indication or suggestion that anything other than the tract "*called* Mare Island" was being claimed or confirmed.*

*The only testimony before the Board identifying Mare Island was the testimony of General Vallejo, who testified:

> "It is an Island in San Pablo Bay at the mouth of Napa Creek. The Island is some two and a half miles in length. It is irregular in its width and contains a half a league of land, a little more or less." (R. V—22-23)

Mare Island is at the *mouth* of Napa Creek, as the map at page 3 of the petition shows, and is almost exactly 2½ miles long, whereas the lands involved in this suit are not at the mouth of Napa Creek and if added to Mare Island would make it 10 miles long.

Although it is plain that the only thing that Castro asked for or that was granted to him or that was confirmed was the place called Mare Island—and although four out of the six judges who have passed upon the question have confined the confirmation decree accordingly—the majority below have entirely disregarded this call and have held that the water's edge means the line of ordinary high-water mark.† So construed, the decree covers more than five times as much land as was asked for or granted. We do not contend that if the confirmation decree unmistakably and unequivocally covered all of the lands here in suit it could now be attacked because of error. But we do contend that where, as here, there are two calls in the decree—one that is in accordance with the grant as made and the other of which, as construed by the majority, would cover more than five times as much land as granted—upon the plainest principles that

†The majority below have not only entirely ignored the first call of the decree, but in construing the second call have given it a meaning contrary to the law of the grant itself, which, if followed, would have been consistent with the first call. It was clearly shown that under the Mexican law the grant to Castro went, not to the common law line of ordinary high-water mark, but only to the line of the highest high-water throughout the year. (R. II—624) The government's evidence, as well as that of petitioners (see, for example, R. II—527-528, 532-533, 540-541), showed without conflict that the narrow isthmus between Mare Island and the lands involved in this suit was repeatedly under water. According to the Mexican law, therefore, which was the law of the grant, the water boundary of the island granted to Castro did not extend beyond the isthmus and conformed exactly with what had always been called Mare Island. It is only by construing "water's edge" as meaning the common law boundary of ordinary high-water mark that there is any conflict in the two calls of the confirmation decree. Certainly the court below was not warranted in first giving a construction to the language of the decree that would bring about such a conflict and then, in resolving that conflict, rejecting the call that was in accordance with the grant and adopting a call that would embrace far more land as was asked for or granted.

construction should be adopted which would make the decree correct and in accordance with the grant,—not the one that would make it erroneous.

The applicable rule of construction is stated in 1 *Freeman on Judgments* (5th ed.), Section 76:

> "* * * of two interpretations of the language of the judgment, that one will be adopted which makes it correct and valid, in preference to the one which would make it erroneous."

As was so aptly stated by Judge Hoffman in *United States v. De Haro* (1862) 25 Federal Cases 803, #14,938, dealing with a parallel situation of a conflict in the calls of a confirmation decree:

> "If the language of the decree were explicit and unequivocal, it might be too late now to disturb it, notwithstanding that it might give to the claimants more than they asked for, or any of their witnesses pretended they were entitled to. But in so clear a case of mistake I consider it my duty to lay hold of any ambiguity or discrepancy in its language to enable me to restrict the confirmation to the land actually granted and occupied and claimed." (25 Fed. Cases 805)

The problem we have here has frequently arisen and been determined by the courts. For convenient reference we set forth in the appended footnote* a number of cases

*In *Parker v. Kane* (1860) 22 How. (63 U. S) 1, the description read:

> "Lots One (1) and Six (6) being that part of the northeast quarter lying east of the Milwaukee river * * *"

and it was held that the call for the lots by number controlled the call

in which it is held that a call for a place by name, where the call is correct and in accordance with the intention

for that part of the northeast quarter lying east of the Milwaukee River which embraced a considerably larger area.

In *Wise v. Watts* (C. C. A. 9th Cir. 1917) 239 Fed. 207, the description read:

> "all that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains in the territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864, bounded and described as follows: Beginning" and so on by courses and distances "the said tract of land being known as Location No. 3 of the Baca Series * * *"

and it was held that there were three separate calls or descriptions and that the calls for the tract by name (i.e., as the tract granted to the heirs of Baca and as Location No. 3 of the Baca Series) controlled the metes and bounds description.

In *Piper v. True* (1869) 36 Cal. 606 the description was:

> "One undivided half part of all that certain tract or parcel of land situate, lying and being in the County of Contra Costa, in the State of California, known as the 'Rancho Canada del Hambre y las Bolsas,' being the tract of land upon which the Town of Martinez is situated, and the same confirmed to said Teodora Soto by decree of the District Court of the United States for the Northern District of California, and surveyed by order of the Surveyor General of the United States for California, by A. W. Von Schmidt, Deputy Surveyor, in March, 1860, and approved by said Surveyor General; the said tract, according to said survey, containing thirteen thousand three hundred and twelve and seventy-one-hundredths acres of land; saving and excepting therefrom the piece of land now occupied and inclosed by the parties of the first part, * * *"

and it was held that there were five calls and that the calls for "Rancho Canada del Hambre y las Bolsas" and "the land confirmed by the District Court of the United States" were controlling.

In *Haley v. Amestoy* (1872) 44 Cal. 132, the description was:

> "All the undivided two thirds (2/3) of all the lands known by the name of 'Rancho de San Vicente,' lying and being situate in the County of Los Angeles, and State of California; the lands of said rancho being known and described as follows, to wit: Beginning" and so on by courses and distances,

and it was held that the call "Rancho de San Vicente" controlled the courses and distances.

of the parties, prevails over some other call, even by metes and bounds.

Upon the merits it is plain that the confirmation decree was intended to be consistent with the Castro grant and was intended to confirm the place "called Mare Island". The majority of the court below have erred in failing to give the decree that effect. This error not only results in a decree that is harsh and unjust, but gives rise to a conflict of decision with the *Irwin* case upon the identical question that tends to bring the judicial process into disrepute. The situation is one in which this Court may appropriately exercise its powers of supervision.

Petitioners urge that a writ of certiorari be granted.

Respectfully submitted,

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